IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV 2008-404-008311

UNDER	Section 145A of the Land Transfer Act 1952
BETWEEN	BARBARA SABINE FUNDEL Applicant
AND	PETER GEORGE WALL Respondent

Hearing: 16 March 2009

Appearances: R J Hooker and T Homes for the Applicant
M D Arthur and E Turner for the Respondent

Judgment: 7 April 2009

RESERVED JUDGMENT OF PRIESTLEY J

This judgment was delivered by me on 7 April 2009 at 9.30 am pursuant to Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Date:……

Counsel/Solicitors:
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The Issue

[1] The applicant has lodged a caveat against two certificates of title. She seeks an order under s 145A of the Land Transfer Act 1952 that the caveat not lapse.

[2] The sole issue is thus whether the applicant has a caveatable interest in the land in question. Does an agreement between the applicant's late mother and the respondent relating to mutual wills create an interest which the caveat will support?

Background

[3] The applicant is the daughter (being one of two children) of the late Renate Christa Wall (the "deceased"). The deceased and the respondent married in September 1993. Each had adult children from former relationships.

[4] The deceased died in November 2005. Under her will the residue of the estate, which included two properties (one being at 62 Seacliffe Ave and the other being at 161 Gulf Harbour Drive) passed to the respondent. Both properties were transferred to the respondent. He still owns them.

[5] The respondent has now remarried which obliged him to execute a new will. It is not necessary to record the terms of the respondent's current will, or an earlier will which has been revoked. Suffice to say that a mutual atmosphere of suspicion and distrust has arisen out of uncertainties over the respondent's testamentary intention and the circumstances under which the applicant obtained a copy of the respondent's will.

Mutual Wills and the 24 June 2005 Agreement

[6] With no children from their own relationship but with children from their previous relationships, the deceased and the respondent were obviously concerned to make wills which were fair to each other and their respective families. Their assets were substantial.

[7] They consulted a solicitor, as a result of which they both executed a Deed entitled "Deed Recording Irrevocable Agreement in Respect of Wills". That Deed was executed on 24 June 2005, the same date the deceased and the respondent signed their respective wills.

[8] Because of the importance of the document I set it out in full.

> **WHEREAS**
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> A. Peter and Renate are about to complete updated Wills.
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> B. Those wills are each providing that both parties are leaving all or most of their respective estates to the other in the event that the other survives them for thirty (30) days. The Wills then go on to provide that the survivor is to leave his/her estate as to 50% to Peter's children and as to 50% to Renate's Children.
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> C. The parties however have been advised that it is possible for the other party to revoke and/or amend their respective Wills either before or after the death of the first party to die and that therefore in order to ensure that the surviving party leaves 50% of his/her estate to the first deceased's party's children that the parties need to enter into an Irrevocable Agreement not to revoke or amend the relevant provisions of their respective Wills in favour of the other party's children.
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> D. The parties therefore wish to record their Agreement in writing.
>
> **NOW THEREFORE**
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> The parties therefore in consideration of their marriage irrevocably agree as follows:
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> 1. That they will not at any time (i.e. either before or after the death of the first party to die) amend or revoke their respective Wills which would have the effect of amending or revoking the provisions contained in their respective Wills whereby if one party has predeceased the other the survivor gives 50% of his/her estate to the first deceased's party's children. The Wills that both parties intend to enter into are attached hereto and marked "A" (Peter's Will) and "B" (Renate's Will). The relevant provision in both Peter's and Renate's Wills is Clause 3(c)(ii) in both Wills.
>
> 2. For clarity we both record that the within Agreement is irrevocable (unless we both agree otherwise) and is intended to be enforceable by the Trustees and/or relevant beneficiaries of our respective estates.
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> 3. We both acknowledge for clarity that in the event that one of us has died and the survivor remarries or enters into a de facto relationship with another person and starts acquiring additional property/assets with that partner/spouse then any such additional assets/liabilities

> would not be taken into account in respect of the assets and liabilities that are the subject of the within Agreement.

[9] The wills, signed by the deceased and respondent, were (in draft) attached to the Deed.

[10] The central terms of the Deed were:

- As prefaced and recorded in preamble C and clause 1, an agreement to leave unaltered those provisions of the wills whereby the surviving party would give 50% of his or her estate to the previously deceased party's children.

- In the event of the survivor remarrying, any additional assets acquired by the surviving partner with the subsequent spouse would not be included in the scope of the agreement.

[11] The respondent survived the relevant 30 day period after his wife's 29 November 2005 death. Thus the operative provisions in the deceased's will were:

- Appointing the respondent sole executor.

- A gift of jewellery to the applicant.

- A gift of bank account cash and investments to the applicant and her brother equally.

- The residue of the estate to the respondent.

[12] The contingent provision of the respondent not surviving the deceased for 30 days was, consistent with the contemporaneous Deed, a bequest of 50% of the residuary estate to the deceased's two children and a bequest of the remaining half share of residue to the respondent's two children.

The Caveat

[13] The caveat which the applicant lodged under s 137 of the Land Transfer Act stipulates as the claimed estate or interest:

> Being a beneficiary in the mutual wills of [the deceased] and [the respondent] pursuant to the Deed Recording Irrevocable Agreement in Respect of Wills between the deceased and the respondent all dated 24 June 2005.

[14] The applicant is not claiming any unregistered interest in the land covered by the two relevant titles. The claimed interest is rooted solely in the 24 June 2005 agreement, in terms of which the respondent contracted with the deceased to leave half of his estate (or in terms of the specific wills annexed to the deed, half of the residue) to the applicant and her sibling.

[15] It is significant the June 2005 agreements and wills do not specify particular assets or sums. Certainly the two properties, the titles of which are subject to the applicant's caveat, were owned by both the deceased and the respondent on 24 June 2005. Ownership was unchanged when the deceased died. The deceased's half shares have subsequently been transmitted or transferred to the respondent. But neither property was the subject of a mention or a devise in any of the June 2005 documents. The respondent is now the registered proprietor of both properties.

[16] The applicant's case thus falls back to the issue of whether the terms of the 24 June 2005 Deed between her mother and stepfather create for her some unregistered or beneficial interest in the two properties which would support a caveat.

Discussion

[17] Mr Hooker's submission was that the June 2005 documents placed on both the deceased and the respondent an obligation to execute and maintain mutual wills. In broad terms he submitted such an obligation imposed on the respondent a constructive trust. The authorities pointed to such a trust arising on the death of the deceased. In terms of the constructive trust the applicant was a beneficiary. On the

respondent's death she and her sibling had a clear entitlement to half of the respondent's estate. Such a beneficial interest was sufficient to support a caveat.

[18] Mr Hooker further submitted from a practical point of view the caveat was necessary to provide the applicant with a measure of control over the land in question, and in particular was a mechanism whereby the applicant could monitor the respondent's intentions with the land. Were for instance, submitted counsel, the respondent minded to create an interest in the land for his current wife, such an arrangement might well have the effect of defeating the applicant's interest in the land since the land would then arguably have been acquired by a subsequent spouse, thus falling inside the terms of clause 3 of the Deed (supra [8]).

[19] Counsel also referred to proceedings which the applicant was contemplating but has not yet filed. A draft statement of claim is annexed to her affidavit. That document pleaded the June 2005 agreement and sought a declaration that the respondent held all the property he owned jointly with the deceased for all four of the children in equal shares.

[20] Mr Hooker placed heavy reliance on the West Australia Supreme Court authority of *Fazari v Cosentino* [2008] WASC 149. Le Miere J was faced with a situation where a husband and wife (as here) had made mutual wills and agreed that neither would revoke the will without the written consent of the other. The wife survived 30 days and thereby acquired realty which her deceased husband had owned. The parties' mutual wills, similar to the wills here, gave the residue of each estate to the parties' two children if there was no 30 day survivorship.

[21] Subsequently the surviving wife and her son entered into a contract in terms of which one of various properties the wife had inherited was to be transferred to the wife and the son jointly by way of gift.

[22] The daughter filed proceedings against her mother and brother seeking extensive equitable remedies including a declaration that the assets acquired on her survivorship by the mother were held on trust, declarations that the mother was obliged not to sell or charge various properties, and an order setting aside the transfer

to the brother, and injunctive relief. She also sought an extension of a caveat lodged against the relevant title.

[23] The Judge reviewed the Australian authority of *Birmingham v Renfrew* (1937) 57 CLR 666 (infra [27])). The Judge referred to the daughter's submission that the inter vivos gift between mother and son was designed to defeat the intention of the compact between the deceased and his wife.

[24] The Judge ordered the caveat to be extended. He held that there was a serious question to be tried as to whether the plaintiff daughter had an equitable interest in her mother's property, including the property to be transferred to the son, and other properties. In particular was the serious issue of whether the proposed gift of one of the properties from the surviving wife to the son was calculated to defeat the intention of "the compact" between the husband and the wife.

[25] Referring to both *Birmingham v Renfrew* and a text, the Judge considered that it was relevant to the issue of whether the daughter had a proprietary interest in the properties in question to know the time at which she might have obtained a beneficial interest under the mutual wills (at [33]). The Judge set out a passage from Ford HAJ & Lee WA *Principles of the Law of Trusts*, vol 2, 22.2660.

> Whether a floating charge is a present charge over assets now held or to be acquired, coupled with a licence to the chargor to deal with the assets in the ordinary course of business, or whether it is no more than a charge of such future assets as are held at the time of crystallisation in the future, is a matter for debate.

The Judge commented it was not necessary for him to decide that issue in the context of whether there is a serious question to be tried as regards the daughter's alleged equitable interest.

[26] I do not for the purposes of this judgment intend to review extensively the Australian law relating to mutual wills. (A useful survey is contained in the small monograph *Mutual Wills*, J Cassidy (2000 Federation Press). In very broad terms the consequence of a mutual wills agreement is to impose a trust on the second testator's property in favour of the intended beneficiary. Such a trust (*ibid*, 60) can

be regarded as a floating constructive trust arising at the time of a first testator's death.

[27] The classic statement of this equitable approach is found in the judgment of Dixon J in *Birmingham v Renfrew* (1937) 57 CLR 666. The case involved the making of mutual wills by a husband and wife a day apart. The husband survived and, after several changes of will, died benefiting his own relatives to the detriment of his wife's relatives who had been the sole beneficiaries of his earlier mutual will. Dixon J comprehensively reviewed relevant 19th Century cases. He stated (at 683):

> It has long been established that a contract between persons to make corresponding wills gives rise to equitable obligations when one acts on the faith of such an agreement and dies leaving his will unrevoked so that the other takes property under its dispositions. It operates to impose upon the survivor an obligation regarded as specifically enforceable. It is true that he cannot be compelled to make and leave unrevoked a testamentary document and if he dies leaving a last will containing provisions inconsistent with his agreement it is nevertheless valid as a testamentary act. But the doctrines of equity attach the obligation to the property. The effect is, I think, that the survivor becomes a constructive trustee and the terms of the trust are those of the will which he undertook would be his last will.

[28] Later, dealing with the equitable effect of a mutual will on the assets of the surviving testator, Dixon J said at 689:

> The purpose of an arrangement for corresponding wills must often, be as in this case, to enable the survivor during his life to deal as absolute owner with the property passing under the will of the party first dying. That is to say, the object of the transaction is to put the survivor in a position to enjoy for his own benefit the full ownership so that, for instance, he may convert it and expend the proceeds if he choose. But when he dies he is to bequeath what is left in the manner agreed upon. It is only by the special doctrines of equity that such a floating obligation, suspended, so to speak, during the lifetime of the survivor can descend upon the assets at his death and crystallize into a trust. No doubts gifts and settlements, *inter vivos*, if calculated to defeat the intention of the compact, could not be made by the survivor and his right of disposition, *inter vivos*, is therefore, not unqualified. But, substantially, the purpose of the arrangement will often be to allow full enjoyment for the survivor's own benefit and advantage upon condition that at his death the residue shall pass as arranged.

[29] An extremely helpful review of the law in this area, particularly relevant to the creation of obligations, is contained in the judgment of Blanchard J in the Court of Appeal authority *Lewis v Cotton* [2001] 2 NZLR 21 at 23, an authority for the

proposition that courts will be slow to find wills to be mutual wills merely because they corresponded.

> [40] The doctrine of mutual wills is closely analogous in its operation to the concept of the secret trust in which, for example, A leaves property to B upon an undertaking that B, although no trust is mentioned in the will, is to hold it for C or is to leave it for C under B's will (see, for example, *Ottaway v Norman* [1972] 1 Ch 698). B then cannot take the property and repudiate the obligation to C. If B's will in fact leaves the property elsewhere, B's trustees must hold the property for C. Equity will not permit B to commit a fraud on A and on C by allowing B to deal with the property contrary to the undertaking.
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> [41] The origin of the doctrine was in cases of joint wills (eg *Dufour v Pereira* (1769) 1 Dick 419 and *Denyssen v Mostert* (1872) LR 4 PC 236). Such a document, signed by two testators, is read as separate wills (*Denyssen* at p 254). For most purposes it makes very little difference whether or not there are separate documents although a joint will would at the present day be such a rarity that its existence might point strongly towards a mutual intention that neither should revoke.
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> [42] While there is still some uncertainty about the legal theory underlying the doctrine, some points are tolerably clear. A will maker can always revoke his or her will even if non-revocation has been contractually promised, for a will is by its very nature and in its very essence a revocable instrument (*Vynior's Case* (1609) 8 Co Rep 81b at p 829; *In the Estate of Heys* [1914] P 192 at p 197). But the consequence of the promise may be that the executors and trustees of any replacement will, if it becomes operative upon the death of the testator, will be required to hold the affected assets upon a constructive trust in terms of the revoked will. In *Birmingham v Renfrew* (1936) (sic) 57 CLR 666 it was said by Dixon J that it is the trust arising from the course of conduct which is enforced, not the contract itself. *In Re Dale, Decd* [1994] Ch 31 at p 41 Morritt J quoted the remark of Lord Camden LC in Dufour v Pereira that "a man may so bind his assets by agreement, that his will shall be a trustee for the performance of his agreement".
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> [43] Where "mutual wills" have been made the promise may be said to be either (a) not to revoke at any time whether secretly or openly (*Bigg v Queensland Trustees Ltd* [1990] 2 Qd R 11; *Re Newey (Deceased)* [1994] 2 NZLR 590 at p 593); or (b), more normally, not to revoke secretly during the other will maker's lifetime, thus depriving the other person of the ability to adjust his or her own will, and, secondly, not to revoke at all after the other's death, which event of course makes the other's promise truly irrevocable. Although there tends in the cases to be a concentration on non-revocation, Associate Professor Cassidy points out at p 34 that the obligation not to deal with property contrary to the agreement or understanding is the crux.
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> …
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> [51] Where the survivor is given the use of property under the mutual will of what in some early cases is quaintly called the first dier, it may be implicit that the survivor, though bound to bequeath the property in terms of the mutual will, may be taken to have agreed only to pass on what he or she

> has not sold, expended or consumed, provided that he or she does not act so as deliberately to defeat the purposes of the arrangement. This has been described in *Birmingham* by Dixon J as a "floating obligation" which crystallises on the death of the survivor.

The Court on the facts did not consider a mutual will existed. The last paragraph as it relates to the obligations of the survivor is of particular relevance to the residue of the deceased's estate and the respondent's assets.

[30] I have no difficulty here in deciding that the relevant wills of the deceased and the respondent were mutual wills. The deed which they signed contemporaneously makes the status of the wills clear.

[31] I now turn to the central issue of whether the obligations imposed on the respondent by the June 2005 documents are sufficient to create an equitable interest for the applicant sufficient to support a caveat. My clear view is that no such interest is created. The "floating constructive trust" (supra [26]) which, on respectable arguments, came into existence at the deceased's death, does not attach to specific assets or indeed to *in specie* components of the deceased's estate. Rather the trust attaches to the respondent's assets at the date of his death. There is no evidence, as was present in *Fazari v Cosentino*, to suggest that the respondent is currently taking steps to avoid his obligations or reduce the size of his estate. The respondent's clear obligations relate to the residue of his estate and in particular to his entitlement to the residue of the deceased's estate. As I have already stated, the June 2005 documents do not single out the properties which are currently subject to the applicant's caveat.

[32] For these reasons I am unattracted to Mr Hooker's submission that the constructive trust created by the June 2005 documents creates a specific beneficial interest in the two relevant properties for the applicant which provide a proper foundation for a caveat.

[33] Counsel relied on a dictum of Lord Wilberforce in *Gartside v Inland Revenue Commissioners* [1968] AC 553, 617, approved by Blanchard J delivering the Supreme Court's judgment in *Kain v Hutton* [2008] 3 NZLR 589, a case involving the validity of a power of appointment, at [25] to the effect that a discretionary object of a trust as "… a right to have his interest protected by a court equity". That is true.

The applicant indeed has enforceable rights in equity. But those rights, arising out of the mutual wills, do not necessarily create a caveatable interest.

[34] In *Fisher v Mansfield* [1997] 2 NZLR 320 Heron J agreed with a Master whose judgment he was reviewing that a caveat could be sustained in a situation where mutual wills had created an equitable interest in a former joint family home. The wills specifically identified the family home. On the authority of *Birmingham v Renfrew* the Judge considered the acceptance by the surviving spouse of the benefits under the will gave rise to an ongoing trust in favour of the first dying spouse's grandchildren and that they thus had a caveatable interest in the specifically mentioned joint family home. Significantly the property was a specific asset, not residue.

[35] Highlighting the difference is the judgment of Anderson J, *Bayer v Wiltshier* (HC AK CP131/97 21 July 1998), again a case involving mutual wills where the deceased's children endeavoured to protect their interests by way of caveats against two properties. The wills in question (unlike the situation in *Fisher v Mansfield*) gave interests in residue to the caveators. The properties were not specifically mentioned.

[36] His Honour stated, and with respect I agree with him;

> The nature of equity's supervision and intervention will depend on the nature of the obligations created and assumed by the makers of the mutual wills. Almost invariably these will be defined by the terms of the wills themselves. Where the parties intend that specific property will be left to the survivor who will dispose of that property in accordance with a mutual will, the trust will be impressed on such property, including in the hands of the survivor, to effectuate the mutual intent. Such a situation obtained in *Fisher v Mansfield*. Where, however, a survivor receives property in terms of mutual wills and the survivor's mutual will provides that on the survivor's death the survivor's estate will devolve in a certain way, equity will impress a trust on that estate immediately upon the death of the survivor to enforce the mutual obligation. *Birmingham v Renfrew* was such a case. In this type of case equity will enforce the implied obligation of good faith between the mutual will makers so as to restrain, for example, in an attempt to avoid the prospective testamentary obligation by deliberate dissipation of the estate, including by way of inexplicable gifts to others. Also if a survivor revokes a mutual will, equity might make a declaration that the survivor's property when determined at the point of death will be fixed with the trust in favour of an intended beneficiary. It will almost invariably be necessary for the

> terms of the mutual wills themselves to be examined in order to define the obligations which equity will enforce. (citations omitted)

[37] His Honour was prepared to make a declaration confirming monetary legacies to the claimants which were specified in the mutual wills. He directed, however, that the caveats lodged against two properties had to be removed, for reasons which are obvious, from the above passage in his judgment.

[38] These authorities have been neatly and correctly summarised in Hinde, McMorland, and Sim *Land Law in New Zealand* (2008 LexisNexis) at 10.009(c).

> Where the parties to mutual wills agree that on the death of one party specific property will be left to the survivor, who will in turn leave that property by will to the beneficiary, a constructive trust will, on the first party's death, be imposed on the property in favour of the beneficiary. At that point the beneficiary therefore obtains an equitable interest in the devised property [*Fisher v Mansfield* [1997] 2 NZLR 230]. Where the devised property is Land Transfer land, or where the devised property can be traced into Land Transfer land, the beneficiary's equitable interest will support a caveat [*Fisher v Mansfield*]. By contrast, where the mutual wills merely oblige the survivor to leave the residue of his or her estate to the beneficiary, the beneficiary has no interest in any specific property of the survivor, and therefore no caveatable interest in any Land Transfer land owned by the survivor [*Bayer v Wiltshier* HC AK CP131/97 21 July 1998, Anderson J, and *McNamara v Mulqueeney* HC AK M1355/02 14 March 2003, Master Sargisson].

[39] Relevant too in the area of caveatable interests flowing from wills is the Court of Appeal judgment in *Guardian, Trust, and Executors Company of New Zealand Limited v Hall* [1938] NZLR 1020, 1026:

> The interest conferred upon the caveator by the will of his father was a right to a share in residue, and the residue was to be arrived at by sale, realization, and a discharge of liabilities. This process is not yet complete…. [T]he legatee of a share in residue has no interest in any of the property of the testator until the residue has been ascertained… his right is to have the estate properly administered and applied for his benefit when the administration is complete.

There were similar observations by McMullin J and Somers J respectively in *Holt v Anchorage Management Limited* [1987] 1 NZLR 108, 114 and 117.

Result

[40] It has not been necessary for me to refer to the law relating to the lodging and sustaining of caveats. There is no dispute between counsel about the general principles. The sole issue here is whether, on the facts of this particular case, the applicant has an equitable interest in the properties covered by the two titles sufficient to constitute an entitlement to or a beneficial interest in the land by virtue of an implied trust for the purposes of s 137(1)(a).

[41] As stated elsewhere in the judgment I have no doubt that the applicant and her brother, by virtue of their status as the deceased's children, have clear equitable rights arising out of the mutual wills in the September 2005 Deed which the deceased and the respondent executed.

[42] However, for the reasons I have stated, the interests of the applicant which arise out of the trust created by the execution of those mutual wills, do not create an equitable interest in either of the two properties against the titles of which the applicant's caveat has been lodged.

[43] For these reasons therefore, the applicant's originating application that the caveat not lapse until further order of the court is dismissed.

Costs

[44] The respondent is entitled to costs against the applicant on the 2B scale. Counsel are directed to resolve the costs issue between themselves with leave reserved to approach this Court if, for some unforeseen reason, they are unable to do so.

.....…
Priestley J